

**A JP Finance (M) Bhd v Tanswan Brothers Enterprise
Sdn Bhd & Ors**

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D23-2315-87
VC GEORGE J

B 3 SEPTEMBER 1993

Civil Procedure — Costs — Getting up — Whether taxing officer bound by scale of costs laid down in the Rules of the High Court 1980 — Rules of the High Court 1980 O 59

C *Civil Procedure* — Costs — Getting up — Summary trial — Whether party could claim 'getting up' before case set down for trial — General principles applicable

Civil Procedure — Costs — Getting up — Summary trial — Fixed costs prescribed in O 48 r 28 of the Subordinate Courts Rules 1980 — Can be used as a guide to what may be allowed as costs for O 14 proceedings on the High Court — Subordinate Courts Rules 1980 O 48 r 28 — Rules of the High Court 1980 O 14

D *Words and Phrases* — 'Unless the court otherwise orders' — Effect of the proviso to O 59 r 31(4) of the Rules of the High Court 1980 — Whether costs could be awarded outside App 2 to O 59 — Rules of the High Court 1980 O 59

E The plaintiff's claim against the first defendant was in respect of a term loan with interest and costs and against the second defendant on the written guarantee given by them in respect of the repayment of the loan, interest and costs and other related charges. The senior assistant registrar ('the SAR') gave an O 14 judgment against the second defendant. The appeal against it was allowed and the second defendant was given unconditional leave to defend as there was found to be a bona fide triable issue. The plaintiff thereafter sought to withdraw the action against the second defendant with liberty to refile. Costs of the withdrawn action was ordered to be paid to the second defendant before any new action in respect of the claim against them was filed. The review sought is in respect of 'getting up' the O 14 application before the SAR and 'getting up' the appeal from the SAR's decision.

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Held, allowing the costs to be further taxed:

H (1) The taxing officer is bound by the prescribed scale of costs in the Rules of the High Court 1980 ('the RHC'). However, where in items in App 1, the amount to be allowed is in the discretion of the taxing officer, he is entitled to allow for the reduction of the value of money. While the costs fixed for the successful plaintiff should not be regarded as providing a 'ceiling' when costs are taxed in favour of a successful defendant, the defendant should not be allowed anything significantly greater than that that would have been awarded to the plaintiff if he had been successful in the O 14 application as that would be to make nonsense of the amount prescribed as fixed costs by the rules committee.

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- (2) The phrase 'unless the court otherwise orders' in O 59 r 31(4) of the RHC provides an important proviso to the application of App 2. Its effect is to provide the court with jurisdiction to take a cause to which App 2 normally applies out of the appendix by ordering otherwise. Inter alia, the court may order that the costs be taxed applying the scale of costs in App 1 or the court could invoke O 59 r 9(4) and award a gross sum in lieu of taxed costs. A B
- (3) Where the facts and/or the law is involved and is not simple or straightforward, it does not necessarily mean that O 14 proceedings are not suitable. In that kind of cause, if the plaintiff succeeds in obtaining unconditional final judgment, counsel should point out that the court could and should direct that the computation of costs be taken out of App 2 and order that it be taxed using App 1, and where the defendant succeeds, the taxing officer should not ignore the prescribed fixed costs in App 2 but should also consider whether the court would have taken the computation of costs out of App 2 if the plaintiff had succeeded. C D
- (4) An analysis of the fixed costs prescribed in O 48 r 28 of the Subordinate Courts Rules ('the SCR') shows that the plaintiff who obtains summary judgment gets about 20% of what the successful plaintiff or defendant would have obtained as costs after a full trial of the action and provides something firm on which the taxing officer may hang on to in taxing costs ordered to be taxed in respect of O 14 proceedings. E
- (5) In the instant case, RM2,000 was allowed for 'getting up' in respect of the O 14 proceedings and RM1,500 as 'getting up' for the appeal as although there would be some duplication, the solicitors would have to refresh their minds on the issues and on the facts and the law and also look at it from a perspective that is different from that of first instance. As to the costs of the review, RM250 was allowed. F

[Bahasa Malaysia summary]

Tuntutan plaintiff terhadap defendan pertama berkenaan dengan suatu pinjaman bertempoh bersama dengan faedah dan kos dan terhadap defendan kedua berkenaan dengan suatu jaminan bertulis yang telah diberikan olehnya berkaitan dengan pembayaran balik pinjaman tersebut, faedah, kos dan lain-lain bayaran. Penolong kanan pendaftar ('PKP') telah memberikan penghakiman A 14 terhadap defendan kedua. Rayuan terhadapnya telah dibenarkan dan defendan kedua telah diberi kebenaran tanpa syarat untuk membela dirinya kerana didapati ada isu bona fide yang perlu dibicarakan. Plaintiff kemudiannya telah memohon untuk menarik balik tindakan terhadap defendan kedua dengan kebebasan untuk memfail semula. Kos tindakan diarahkan supaya dibayar kepada defendan kedua sebelum sebarang tindakan baru berkenaan dengan tuntutan terhadap mereka boleh difailkan. Kajian semula ini dipohon berkenaan dengan penyediaan G H I

A guaman untuk permohonan A 14 di hadapan PKP dan penyediaan guaman untuk rayuan daripada keputusan PKP.

Diputuskan, mengurangkan kos yang ditetapkan:

- B (1) Pegawai penetapan kos diikat oleh skala kos yang ditetapkan di dalam Kaedah-Kaedah Mahkamah Tinggi 1980 ('Kaedah itu'). Bagaimanapun, di mana di dalam butiran dalam Lamp 1, jumlah yang dibenarkan adalah menurut budi bicara pegawai penetapan kos, beliau berhak memberi suatu pengurangan dalam nilai wang. Manakala kos yang ditetapkan untuk seseorang plaintiff yang berjaya tidak harus dianggap sebagai memperuntukkan suatu 'bumbung'
- C apabila kos ditetapkan memihak kepada seseorang defendan yang berjaya, defendan itu tidak sepatutnya dibenarkan mendapat kos yang nyata lebih tinggi daripada apa yang mungkin diawardkan kepada plaintiff jika beliau berjaya dalam permohonan A 14 kerana itu akan menjadikan jumlah yang ditetapkan sebagai kos tetap oleh jawatankuasa kaedah tidak bermakna.
- D (2) Ungkapan 'unless the court otherwise orders' di dalam A 59 k 31(4) Kaedah itu menyediakan suatu proviso penting kepada pemakaian Lamp 2. Kesannya adalah untuk memberikan mahkamah bidang kuasa untuk mengambil sesuatu kausa yang kepadanya Lamp 2 biasanya terpakai keluar daripada lampiran itu dengan memerintahkan sebaliknya. Antara lain, mahkamah boleh memerintahkan supaya kos ditetapkan dengan memakai skala kos di dalam Lamp 1 ataupun mahkamah boleh menggunakan A 59 k 9(4) dan mengawardkan suatu jumlah kasar sebagai ganti kos yang ditetapkan.
- E (3) Di mana fakta dan/atau undang-undang terlibat dan ia bukan jelas ataupun mudah, ini tidak semestinya bermakna bahawa prosiding A 14 tidak sesuai. Dalam kausa sedemikian, jika plaintiff berjaya mendapat penghakiman muktamad tanpa syarat, peguambela harus menunjukkan bahawa mahkamah boleh dan patut mengarahkan supaya pengiraan kos diambil keluar daripada Lamp 2 dan memerintahkan supaya ia ditetapkan dengan menggunakan Lamp 1, dan di mana defendan berjaya, pegawai penetapan kos tidak seharusnya tidak mengendahkan kos tetap yang ditetapkan di Lamp 2 tetapi harus juga mempertimbangkan sama ada mahkamah mungkin mengambil pengiraan kos keluar daripada Lampiran 2 jika plaintiff telah berjaya.
- F (4) Suatu analisa kos tetap yang ditetapkan di bawah A 48 k 28 Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR') menunjukkan bahawa seseorang plaintiff yang mendapat penghakiman terus mendapat kira-kira 20% daripada apa yang seseorang plaintiff atau defendan akan mendapat sebagai kos selepas suatu perbicaraan lengkap tindakan itu dan memberikan suatu petunjuk kepada pegawai penetapan kos berkenaan dengan prosiding A 14 itu.
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- (5) Dalam kes ini, RM2,000 dibenarkan untuk penyediaan guaman berkenaan dengan prosiding A 14 dan RM1,500 untuk penyediaan guaman bagi rayuan kerana walaupun terdapat sedikit penduaan, peguamcara mesti memperingatkan semula tentang isu dan fakta dan undang-undang dan juga mempertimbangkannya dari sudut pandangan yang berlainan berbanding dengan pada perbicaraan awal. Berkenaan dengan kos kajian semula, RM250 dibenarkan.]

Notes

For cases on 'getting up' costs, see 2 *Mallal's Digest* (4th Ed) paras 629–635.

Cases referred to

- 1 *Chop Yoon Kee Hang v Motor Union Insurance Co Ltd* [1932] MLJ 67 (refd)
- 2 *State of Selangor v Kepong Dredging Co Ltd* [1932] MLJ 181 (refd)
- 3 *Lee Bang v Nadzri* [1965] 2 MLJ 186 (refd)
- 4 *Re Kana Moona Syed Abubakar (decd); Khatijah Nachiar v Sultan Allaudin and the Assistant Official Assignee, Penang & Ors* [1940] MLJ 4 (refd)
- 5 *Starlite Ceramic Industry Ltd v Hiap Huat Pottery* [1973] 1 MLJ 146 (refd)
- 6 *Lloyds Bank plc v Ang Cheng Ho Quarry & Ors* [1993] 1 MLJ 127 (refd)
- 7 *Poh Soon Huat v Malayan Banking Ltd* [1983] 2 MLJ clxxv (refd)
- 8 *Canopee Investment Pte Ltd & Ors v Landmarks Holdings Bhd & Ors* [1990] 1 MLJ 292 (refd)
- 9 *Seow Seng Choon v Yap Kim Chye & Anor* [1952] MLJ 244 (refd)
- 10 *Tham Kwa Chin v Choong Hoong Sum* [1954] MLJ 161 (refd)
- 11 *Supreme Finance (M) Sdn Bhd v Bukit Barat Development Sdn Bhd* [1991] 2 CLJ 1394 (refd)
- 12 *Cow v Casey* [1949] 1 KB 474; [1949] 1 All ER 197 (refd)
- 13 *European Asian Bank AG v Punjab & Sind Bank* [1983] 2 All ER 508 (refd)
- 14 *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183 (refd)

Legislation referred to

Rules of the High Court 1980 O 59 r 31(1), (4), App 1

Rita Phuah (Soo Thien Ming & Shahrizat) for the plaintiff.

Wu Tern Yue (KC Yap Kamaludin & Partners) for the second defendant.

Cur Adv Vult

VC George J: This is a summons to the judge for the review of the registrar's taxation of the bill of costs of the second defendant.

A The plaintiff's claim against the first defendant was in respect of a term loan of RM600,000, interest and costs. The claim against the other defendants, including the second defendant, was on the written guarantee given by them in respect of the repayment of the loan, interest and costs and other related charges. The amount said to be owing when the writ was filed was RM697,451.13.

B The senior assistant registrar had given an O 14 judgment against the second defendant. The appeal against it was allowed and the second defendant was given unconditional leave to defend. One ground for allowing the appeal was that it being an on-demand guarantee, a condition precedent to suing was whether there had been a demand, and, on the facts before the court, whether a demand had been made was found to be a bona fide triable issue. The plaintiff thereafter, not unexpectedly, sought leave to withdraw the action as against the second defendant (and the fourth defendant) with liberty to refile after a fresh demand was made. The senior assistant registrar had refused the application. The appeal by the second defendant against the refusal was allowed. The action as against the second (and fourth defendant) was struck off. Costs of the withdrawn action was ordered to be paid (as taxed) to the second defendant before any new action in respect of the claim against him is filed. It is the taxation pursuant to that order for costs that is the subject of this review.

C The review sought is in respect of 'getting up' the O 14 application before the senior assistant registrar (No 28 at p 4 of the bill of costs, item 26 of App 1 to O 59) and 'getting up' the appeal from the registrar's decision (No 58 at p 7 of the bill of costs, item 27 of App 1). In respect of the former, RM40,000 was billed and RM12,000 was allowed and maintained by the registrar on review; in respect of the latter, RM25,000 was billed and RM8,000 was allowed and maintained on review.

E Now, item 1(c) of App 2 to O 59 provides that in a claim for a debt or liquidated demand, in respect of O 14 proceedings, the successful plaintiff is allowed a fixed basic cost of RM350. There is no similar provision for fixed costs to a defendant who is awarded the costs of an O 14 application and accordingly, the defendant is entitled to have his costs taxed.

F Items 26 and 27 of App 1 to O 59 and the note thereto are as follows:

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26 Instructions for trial or hearing of any cause or matter, whatever the mode of trial or hearing.	Discretionary	
27 Instructions for appeal from an interlocutory or final order or judgment.	Discretionary	

H Note to items 26 and 27—

These items are intended to cover the doing of any work, not otherwise provided for, necessarily or properly done in preparing for a trial, hearing or appeal, or before a settlement of the matters in dispute, including—

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- (a) taking instructions to sue, defend, counterclaim or appeal, or for any pleading, particulars of pleading, affidavit, preliminary act or claim in a reference under O 70 r 39;
 - (b) considering the facts and law;

- (c) attending on and corresponding with client; A
- (d) interviewing and corresponding with witnesses and potential witnesses and taking proofs of their evidence;
- (e) arranging to obtain reports or advice from experts and plans, photographs and models;
- (f) making search in a Government office and elsewhere for relevant documents;
- (g) inspecting any property or place material to the proceedings; B
- (h) perusing pleadings, affidavits and other relevant documents;
- (i) where the cause or matter does not proceed to trial or hearing, work done in connection with the negotiation of a settlement; and
- (j) the general care and conduct of the proceedings.

It used to be suggested that normally a party is not entitled to 'getting up' until the case had been set down for trial — see for instance *Chop Yoon Kee Hang v Motor Union Insurance Co Ltd*¹ and see the *State of Selangor v Kepong Dredging Co Ltd*² where Thorne Ag CJ said that 'getting up' cannot be charged until the solicitors know the facts and law to be debated on and that usually that stage (of knowledge) is not reached until the pleadings are closed. In *Lee Bang v Nadzri*,³ MacIntyre J referred to *Re Kana Moona Syed Abubakar (decd)*; *Khatijah Nachiar v Sultan Allaudin and the Assistant Official Assignee, Penang & Ors*⁴ which he pointed had overruled the previously held view. In the Singapore case, *Starlite Ceramic Industry Ltd v Hiap Huat Pottery*,⁵ Choor Singh J (at p 149) in reviewing an item of \$700 allowed by the registrar in respect of 'getting up' done before the issue of the writ (the writ was withdrawn soon after it had been filed), after considering a number of Singapore, Malaysian and English judgments, concluded that the following general principles emerge from the cases:

- (1) A solicitor is entitled to costs of such work as was reasonably necessary for the prosecution or defence of his client's case. F
- (2) The taxing officer, having regard to the circumstances of each case, must decide whether the work was necessary and proper and the time for doing it had arrived.
- (3) The taxing officer has a discretion to allow charges and expenses properly and reasonably incurred in procuring evidence before notice of trial, and even when the evidence is collected, in whole or in part, before the action is commenced. The test is whether the costs incurred before the commencement of the action were necessary and proper for the attainment of justice. G
- (4) A solicitor is entitled to a 'getting up' fee for work done which was necessary and proper even though the case had not been set down for trial.
- (5) The court will not interfere with the decision of the taxing officer upon a mere question of quantum if the taxing officer has exercised his discretion after consideration of all the circumstances and if no question of principle arises. It is only when such discretion has been exercised on some wrong principle or the quantum allowed is obviously wrong that a judge will interfere. H

In *Lloyds Bank plc v Ang Cheng Ho Quarry & Ors*,⁶ Chong Siew Fai J ruled that a defendant who had been sued but had the action against him withdrawn by the plaintiff was entitled to 'getting up' even though the

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A action had not been set down for trial. There, the defendant had filed his defence and the plaintiff had taken out O 14 and O 18 r 19 applications before the action was withdrawn. The claim was for RM2,107,968.28 due on a banking facility. The defendant had raised various defences including illegality, invoking the exchange control provisions and the omission to obtain the consent of Bank Negara for the granting of the facility and had also invoked the provisions of the Moneylenders Act 1951 in asking for the claim to be dismissed. The taxing officer had ordered RM28,000 for getting up. On review, the learned judge, after rejecting the contention that at the stage the action had reached, the defendant was not entitled to getting up, reduced the amount to RM18,000. It is clear that the learned judge shared the view of Choor Singh J (*Starlite*⁵ was referred to in the judgment) that an amount for 'getting up' may be allowed for work done that was necessary and proper even though the case had not been set down for trial.

However the effect, if any, on the costs to be awarded to a successful defendant in an O 14 application, of the fact that the rules provide fixed costs for a successful plaintiff in an O 14 application does not appear to have been explored in any reported Malaysian or Singapore judgments apart from *Poh Soon Huat v Malaysian Banking Ltd*,⁷ in which the deputy registrar of the Singapore Supreme Court touched upon it. He allowed \$700 for the getting up on a bill presented for taxation on behalf of the defendant where the writ was discontinued after an O 14 application was filed but before it was heard. Counsel for the plaintiff had pointed out that had the plaintiff been successful in the O 14 application he would have been entitled to only \$700 fixed costs (that is the amount prescribed by the Singapore rules committee in provisions equipolent to App 2 to our O 59 of the Rules of the High Court ('the RHC')) and had contended that it follows that the defendant's total costs should also not be more than \$700 and that it follows that for 'getting up' the defendant should be allowed an amount somewhat less than \$700. The learned deputy registrar was not altogether impressed with the submission. He was not prepared to accept that the amount prescribed as fixed costs for a successful plaintiff in respect of an O 14 application provided 'a ceiling' in respect of costs to be awarded to a defendant who successfully opposed an O 14 application. However, the amount he allowed for 'getting up' was only \$700 which seems to suggest that he had not ignored the amount prescribed for a successful plaintiff.

Now, in *Canopee Investment Pte Ltd & Ors v Landmarks Holdings Bhd & Ors*,⁸ I had suggested that taxing officers could get some guidance from the rules committee's views on the quantum to be awarded. I said [at p 293]:

I A starting point in considering the exercise of discretion by a taxing officer particularly in respect of the item 'getting-up' could be the fixed scale of costs set out in O 48 r 12 of the Subordinate Courts Rules 1980. The fixed cost in the scale is in proportion to the quantum of the subject matter of the action. The scale is graded up to the maximum of the civil jurisdiction of a sessions court which is RM100,000. The cost fixed for advocacy is RM5,450 and for defending or suing RM1,375 to give a total of RM6,825 for a successful party in an action

where the subject matter of the action is RM100,000. The grading used after a basic amount at the lower end of the scale is an increase of the amount of costs for suing or defending by RM25 per RM1,000 and for advocacy by RM100 per RM1,000.

I pause to note that there are some qualifications I should have made to what was suggested in *Canopee*⁸ (and did not). The first is that there should be a significant tapering of the rate by which the costs are increased as the value of the subject matter of the claim gets higher. It is, of course, not for me to prescribe or lay down the rates at which the increase is to be computed. The rate would vary from case to case. At the low end would be the running down and simple goods sold and delivered type of cases and at the other end the not run-of-the-mill and/or complicated cases. Moreover, particularly to graphically, as it were, bring home the point I am making, I would suggest that in the simpler cases, applying the Subordinate Courts Rules 1980 ('the SCR') scale, where the value of the claim is from, say RM100,001 to RM150,000, the rate of increase should be reduced from RM125 per RM1,000 to say RM60 per RM1,000 and from RM150,001 to say RM1m, the rate should not be more than about RM20 per RM1,000 and thereafter the rate should be reduced to a nominal, say, RM5 to RM10 per RM1,000. In a claim for RM1m in a simple case where the trial had lasted two or three days and where the taxing party is entitled to 'getting up' for the trial of the action, the total costs including 'getting up' but excluding out of pockets, should not be more than, say, about RM27,000 arrived at as follows:

For the first RM100,000 as per the scale	RM6,826
Next RM50,000 say at RM60 per RM1,000	RM3,000
Next RM850,000 say at RM20 per RM1,000	<u>RM17,000</u>
Total as rounded off	<u>RM27,000</u>

The next clarification or qualification to *Canopee*⁸ is that it has to be noted that the scale of costs set out in the SCR are to meet the whole of the costs excluding out of pockets. Accordingly, in arriving at the amount to be allowed for the item 'getting up' alone, there should be an adjustment made on the prescribed amount.

I would emphasize that the rates and figures suggested here are not necessarily those that the taxing officer should use or apply. They are set out here by way of illustration and to point the direction the taxing officer could take in approaching the taxation of a bill of costs.

One other qualification to *Canopee*⁸ is that there should be a further downward adjustment of the amount to be allowed if the 'getting up' involved is not for the full trial. The amount of 'getting up' for an O 14 application where an order for taxation of the costs is made, or for an O 18 r 19 application or other interlocutory proceedings, should normally be significantly less than that for the full trial.

I pause to express the hope that if and when *Canopee*⁸ is cited, reference to these clarifications will not be overlooked.

Coming back to the point in issue in the instant case, in respect of taxing a bill of a defendant who successfully opposed an O 14 application, the

A taxing officer may again find it useful to look for guidelines from the view taken by the rules committee as expressed in Pts I and II of App 2 to O 59 of the RHC and in O 48 r 28 of the SCR.

B Parts I and II of App 2 prescribe fixed costs to be paid in certain circumstances where the claim is for a debt or liquidated demand. Where the plaintiff obtains judgment under O 14 unconditionally, the prescribed basic fixed costs is only RM350. App 2 also provides that in certain circumstances, certain comparatively negligible amounts will be allowed in addition to the fixed amount. It is to be noted that this fixed amount, *inter alia*, covers all the work involved in instituting the proceedings including taking instructions to sue, to settle and settling the writ and the endorsement thereon and/or the statement of claim, taking instructions to file the O 14 application and taking instructions for and drawing the affidavit in support of the application and could include, as it frequently does, the taking of instructions on any affidavits filed in opposition to the O 14 application and in respect of any reply thereto. It also covers the consideration of the facts and the law, attending on and corresponding with the client, attending at the hearing of the O 14 summons and the general care and the whole of the conduct of the proceedings up to and including the O 14 hearing.

E Up to the O 14 stage, solicitors having the conduct of the matter on behalf of the defendant generally would have put in about as much effort and work as the plaintiff's solicitor had put in — they also have to take instructions on the writ and on the endorsements thereon and on any statement of claim that may have been served. They have to take instructions on the affidavit filed in support of the O 14 application and for drawing and filing the affidavit in opposition to the application. In 'getting up' the case to oppose the O 14 application, they have to consider the facts and the law, they also have to attend on and correspond with their clients, they have to attend at the hearing of the O 14 summons. They have the general care and conduct of the proceedings up to and including the O 14 application.

G However the responsibility of the solicitors and counsel for the defendant at the O 14 stage can, in a manner of speaking, be said to be somewhat greater than that of the plaintiff's legal advisers in that if the plaintiff fails, the matter has not come to an end whereas if the defendant fails that would result in a final judgment against him. But apart from that, as has been seen, the solicitors on both sides of an O 14 application would normally have put in the same amount of effort and work.

H It seems to me that in the circumstances, in assessing the quantum of costs to be awarded to a successful defendant in an O 14 application, the fact that the rules committee have prescribed RM350 as fixed costs for a successful plaintiff applicant cannot be ignored.

I As has been pointed out, the defendant's legal advisers can be said to carry a heavier responsibility and no doubt some allowance has to be made for that. Further, bearing in mind that it can be said without any serious fear of contradiction that a revision of the fixed costs and for that matter the whole of the prescribed scale of costs in the RHC is long overdue and although until such revision takes place, the taxing officer is bound by the

prescribed amounts, where in items in App 1 the amount to be allowed is in the discretion of the taxing officer, I think he is entitled to allow for the reduction of the value of money — see 2 *Mallal's Digest* (2nd Ed) at paras 763 and 764 where *Seow Seng Choon v Yap Kim Chye & Anor*⁹ and *Tham Kwa Chin v Choong Hoong Sum*¹⁰ were referred to in the context of taxation of costs — no doubt in those cases the courts were concerned with the award of damages but the principle is (and the learned author of *Mallal's Digest* thinks it should be applied to costs as well) that the courts can and should take judicial notice of and allow for the falling of the value of money.

While I agree with deputy registrar Khoo Oon Soo in *Poh Sum Huat v Malayan Banking Ltd*⁷ that the costs fixed for the successful plaintiff should not be regarded as providing a 'ceiling' when costs are being taxed in favour of a successful defendant, I do not think that the defendant should be allowed anything significantly greater than that that would have been awarded to the plaintiff if he had been successful in the O 14 application. For the taxing officer to allow in favour of a successful defendant in an O 14 application anything substantially greater than the amount fixed by the rules committee in respect of a successful plaintiff will be to make nonsense of the amount prescribed as fixed costs by the rules committee. However, there is an exception to this which has to be and will be explained in analysing O 59 r 31(4) of the RHC.

It is O 59 r 31(1) that provides that the scale of costs contained in App 1 to the order 'shall apply to the taxation of all costs incurred in relation to contentious business done ...'

A qualification to that is in O 59 r 31(4) which is the rule that brings App 2 into play:

- (4) Notwithstanding paragraph (1) costs shall, *unless the Court otherwise orders*, be allowed in the causes to which App 2 to this Order applies in accordance with the provisions of that Appendix. (Emphasis added.)

The phrase 'unless the court otherwise orders' in sub-r (4) provides an important proviso to the application of App 2. Its effect is to provide the court with jurisdiction to take a cause to which App 2 normally applies out of the appendix by ordering otherwise. Inter alia, the court may order that the costs be taxed applying the scale of costs in App 1 or the court could invoke O 59 r 9(4) and award a gross sum in lieu of taxed costs.

Now, having in mind the comparatively small amount of RM350 allowed as fixed costs for a successful plaintiff in an O 14 application, it seems to me that the rules committee must have had in mind the simplest of cases for the application of App 2. This is borne out by the two other causes in respect of which App 2 has application, namely, situations where the defendant without a fight, throws in the towel, as it were, and pays the amount sued for within the time and manner required by the indorsement of the writ or when he allows judgment in default of appearance or in default of defence to be entered.

Where the facts and/or the law is involved and is not simple or straightforward, it does not necessarily mean that O 14 proceedings are not

- A suitable (see *Supreme Finance (M) Sdn Bhd v Bukit Barat Development Sdn Bhd*¹¹ and *Cow v Casey*¹² which was applied in *European Asian Bank v Punjab & Sind Bank*¹³ and which in turn was followed by the Supreme Court in *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd*¹⁴) and in that kind of cause, if the plaintiff succeeds in obtaining unconditional final judgment, counsel should point out that the court could and should direct that the computation of costs be taken out of App 2 and order that it be taxed using App 1.

- B And where the defendant succeeds, the taxing officer should not, as I have said earlier, ignore the prescribed fixed costs in App 2 but should also consider whether the court would have taken the computation of costs out of App 2 if the plaintiff had succeeded.

- C In the simpler cases, the successful defendant should not be awarded anything substantially more than the amounts prescribed by App 2 for a successful plaintiff. In other cases, it is important that the taxing officer makes a distinction between the getting up relevant to the trial of the action and the getting up relevant to the O 14 stage of the action. In an O 14 application, the issue is whether there are triable issues and the primary purpose of the application is to decide whether there has to be a trial. Neither the plaintiff nor the defendant is, at this stage, required to prove his case. Where final judgment is entered for the plaintiff, it is entered summarily, without trial, in consequence of the court finding that there are no triable issues that merit the matter going to trial. It is not because the plaintiff has proved his case.

- D Order 48 r 28 of the SCR recognizes that the costs where the action is disposed of summarily have to be significantly less than the amount that will be awarded after trial of the action and does so by providing that no costs for advocacy shall be allowed where the plaintiff enters judgment under O 26A (which has rules similar to the O 14 rules in the RHC). Applying the said O 48 r 28 to an action for RM100,000 in the subordinate courts, we can see in *Canopee*⁸ and in the extract from that judgment that has been quoted herebefore, that where the plaintiff obtained summary judgment, the costs he would be entitled to would be RM1,375 as opposed to RM6,825 costs after trial. This works out to the plaintiff who obtains summary judgment getting about 20% of what the successful plaintiff or defendant would have obtained as costs after a full trial of the action.

- E One disturbing aspect of this which cannot be ignored is that what is fixed as costs in the SCR appear to be incongruous with the prescribed fixed costs in App 2 to O 59 of the RHC — in the example of a RM100,000 claim where summary judgment is obtained by the plaintiff, he is awarded, as has been seen, RM1,375 as fixed costs whereas if the summary judgment was in the High Court all he would be entitled to is RM350. In fact, even if his O 14 judgment in the High Court is for, say, RM10m he only gets RM350 unless the court orders that his costs be taxed.

- F H I The said 20% or 1/5 of full costs for a summary judgment, gleaned from the analysis of the fixed costs prescribed in the SCR does provide something firm on which the taxing officer may hang on to in taxing costs ordered to be taxed in respect of O 14 proceedings.

In the instant case, the claim against the second defendant was on his guarantee. The first point taken as providing a triable issue was the contention that the consideration for the guarantee was past consideration. This issue was raised by the defendant taking advantage of a typing error in the statement of claim where the date of the loan agreement (repayment of moneys lent pursuant to it was what was guaranteed by the second defendant) was stated to be 6 January 1985 and the date of the guarantee 6 January 1986. It turned out that in fact, both documents were executed on and dated 6 January 1986. The typing error was rectified by an amendment of the statement of claim before the O 14 application was heard and it followed that the first point was a non-point. It is unlikely that this point was pursued before the senior assistant registrar — it certainly was not at the hearing of the appeal from the senior assistant registrar's decision.

The second point taken as a triable issue was that because the plaintiff had taken foreclosure proceedings in respect of the charge on lands provided as security, it was precluded from suing the second defendant or that in any event the suit was premature. The other point taken was based on the guarantee being an on-demand guarantee and whether there had been a due demand was set up as a triable issue. Although the law is well settled on both issues, they call for some getting up of the law and of the facts, to enable counsel to demonstrate to the court that there are bona fide triable issues. That the court eventually held that the former of the two points did not provide a bona fide triable issue does not derogate from the need for the solicitors to have 'got up' the point.

In a manner of speaking, the law in respect of each of these two points is run-of-the-mill in that each of them has been discussed in any number of reported judgments of the Malaysian courts. If the plaintiff had succeeded in the O 14 application and if counsel had sought for the costs thereof to be taxed on the ground that the amount of fixed costs would be inadequate, he would have, I think, succeeded but only or largely because the prescribed amounts have not been revised since June 1980 and the court should not ignore the fact that the value of money has fallen since 1980.

In my judgment, in respect of the instant case, to allow anything more than about RM2,000 for 'getting up' in respect of the O 14 proceedings is to completely lose sight of what the rules committee has prescribed in the appendices to the RHC and to the SCR as its opinion of what should be adequate costs. For the appeal from the senior assistant registrar's decision on the O 14, while there will be a duplication of the 'getting up', the solicitors will have to refresh their minds on the issues and on the facts and the law and will also have to look at it from a perspective that is somewhat different from that of presenting the case to the court of first instance. I would have allowed RM1,500 as 'getting up' for the appeal.

Accordingly in respect of No 28 at p 4 of the bill of costs, item 26, App 1 to O 59, I tax off a further RM10,000 to allow only RM2,000 and in respect of No 58 at p 7 of the bill of costs, item 27 of App 2, tax off a further RM6,500 to allow RM1,500. The allocatur or certificate of the senior

A assistant registrar shall be amended accordingly. As to the costs of the review, I fix it at RM250 to include, inter alia, costs for drawing objections to decisions of the registrar, for drawing, issuing and filing of service of the summons to attend before the judge for the review, for attending at the hearing of the review and 'getting up' the objections and for the review.

B *Order accordingly.*

Reported by Anne Khoo

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